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OFFICE OF PETITIONS

In re Application of :
Kawata et al. :
Application No. 08/931,615 : ON PETITION
Filed: September 16, 1997 (CPA: May 24, 1999) :
Attorney Docket No. 041464-5018-01 :

This is a decision on the petition filed January 31, 2003, requesting under 37 CFR 1.183 that the rules be suspended where they specify that a Reply Brief be filed within two (2) months of the mailing of the Examiner's Answer.

The petition is **DISMISSED**.

Any request for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are NOT permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.183." This is **not** a final agency action within the meaning of 5 U.S.C. § 704.

Facts:

On September 6, 2001, applicant's Appeal Brief was filed.

In response, on November 27, 2001, an Examiner's Answer was mailed to the address of record.

The response was not received until January 15, 2002.

MPEP 710.06 states that when a office action is received late that the period to reply may be reset.

> The Office will grant a petition to restart the previously set period for reply to an Office action to run from the date of receipt of the Office action at the correspondence address when the following criteria are met: . . . (C) the petition includes (1) evidence showing the date of receipt of the Office action at the correspondence address . . . and (2) a statement setting forth the date of receipt of the Office action at the correspondence address.

Petitioner requested the time period to file a reply be reset. Per MPEP 710.06, on April 26, 2002, the period of time was reset to run from "the date of receipt of the Office action at the correspondence address."

As no extensions of time were obtained pursuant to 37 CFR 1.136(b), the two month period for both submission of a Reply Brief pursuant to 37 CFR 1.193(b) expired on March 16, 2002.

Analysis:

In order for a petition under 37 CFR 1.183 to be granted, petitioner must demonstrate the existence of an extraordinary situation where justice requires waiver of one or more federal regulations. It is the responsibility of the Commissioner to determine the definitions of the terms "extraordinary" and "as justice requires" as the terms are used in 37 CFR 1.183.[1] The Commissioner drafted the federal regulations which may be waived including 37 CFR 1.183. The Commissioner is the party responsible for determining when a party has demonstrated that an "extraordinary" situation exists such that "justice requires" waiver of a federal regulation.

In determining when waiver is appropriate, the Office *may* consider the circumstances when courts have exercised their equitable powers to waive requirements of a statute or regulation on behalf of a party. Courts are permitted to waive certain statutory requirements such as time limits.[2] Courts, in determining when waiver is proper, have required due diligence and required more than a "garden variety claim of excusable neglect."[3] The Federal Circuit has stated, "Equitable powers . . . should not be invoked to excuse the performance of a condition by a party that has not acted with reasonable due care and diligence."[4] Factors which may not justify tolling include: pro se status, illiteracy, deafness, lack of legal training, lack of knowledge of the law, lack of knowledge of a legal process, and lack of legal representation.[5] An attorney's lack of

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[1] See Bowles, Price Administrator v. Seminole Rock & Sand Co., 325 U.S. 410, 413-414, 89 L. Ed. 1700, 1702, 65 S. Ct. 1215, 1217 (1945) ("Since this involves the interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.")

[2] See Wood-Ivey Sys. Corp. v United States, 4 F.3d 961, 964 (Fed. Cir. 1993) (Plager, J., concurring) ("Since Irwin [v. Department of Veterans Affairs, 498 U.S. 89, 112 L. Ed. 2d 435, 111 S. Ct. 453, (1990)], compliance with statutory time limits is no longer jurisdictional, in the old sense that when a Congressionally specified time limit had expired a court had no power to entertain the case. The presumption is now to the contrary. The court has jurisdiction to entertain the suit and to determine on the merits if equitable relief from the time bar is warranted.")

[3] See Wiggins v. State Farm Fire and Casualty Co., 153 F. Supp. 2d 16, 21 (D. D.C. 2001) ("A court can equitably toll the statute of limitations . . . plaintiff will not be allowed extra time to file unless he has exercised due diligence, and the plaintiff's excuse must be more than a 'garden variety claim of excusable neglect.'") (citations omitted).

[4] U.S. v. Lockheed Petroleum Services, 709 F.2d 1472, 1475 (Fed. Cir. 1983) (citations omitted) ("Lockheed had several means at its disposal which it could have employed to guarantee compliance with the regulation, yet it neglected to use any of them. Equitable powers . . . should not be invoked to excuse the performance of a condition by a party that has not acted with reasonable due care and diligence."); See also: Grymes v. Sanders et al., 93 U.S. 55, 61; 23 L. Ed. 798, 801 (1876) ("Mistake, to be available in equity, must not have arisen from negligence. . . . The party complaining must have exercised at least the degree of diligence 'which may be fairly expected from a reasonable person.') (citing Kerr on Fraud and Mistake, 407); Garcia v. Office of Personnel Management, 2001 U.S. App. LEXIS 21616, 6 (Fed. Cir. 2001) ("Equity will not intervene, however, to protect a claimant from his or her own failure to exercise due diligence in preserving their legal rights.") (citing Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95 (1990)); Goetz & Goetz v. Secretary of Health and Human Services, 2001 U.S. App. LEXIS 943, 5 (Fed. Cir. 2001) ("the special master's finding of a lack of due diligence was not arbitrary, capricious, or an abuse of discretion, and precludes the application of equitable tolling.") (citing Baldwin County Welcome Ctr. V. Brown, 466 U.S. 147, 151, 80 L. Ed. 2d 196, 104 S. Ct. 1723 (1984) which states, "One who fails to act diligently cannot invoke equitable principles to excuse their lack of diligence.")

[5] See Felder v. Johnson, 204 F.3d 168 171-172 (5th Cir. 2000) (Pro se status is not "rare and exceptional" circumstance, but is typical of those bringing a 28 U.S.C. § 2254 claim. "Mere ignorance of the law or lack of knowledge of filing deadlines does not justify equitable tolling or other exceptions to a law's requirements.") (citing United States v. Flores, 981 F.2d 231, 236 (5th Cir. 1993) as "holding pro se status, illiteracy, deafness, and lack of legal training are not external factors excusing abuse of the writ."); citing Barrow v. New Orleans S.S. Ass'n, 932 F.2d 473, 478 (5th Cir. 1991) as "holding equitable tolling . . . within the Age Discrimination in Employment Act not warranted by plaintiff's unfamiliarity with legal process, his lack of representation, or his ignorance of his legal rights.", (other citations omitted)).

knowledge, misinterpretation of a law, miscalculation of a time period, and failure to exercise due care and diligence will not justify waiver.[6]

A party's inadvertent failure to comply with the requirements of a rule is simply not an extraordinary situation that would warrant waiver of a rule under 37 CFR 1.183.[7]

There is no adequate showing of "an extraordinary situation" in which "justice requires" suspension of the rules.

The MPEP clearly states that when a period of time is reset that the new period of time will run from the date the Office action was received. Petitioner has failed to prove that petitioner was reasonable and prudent in expecting the new period to be reset to run from the date of the decision on the petition.

Since the petition lacks a showing that this is an extraordinary situation, the petition under 37 CFR 1.183 is subject to dismissal.

The file does not indicate a change of address has been submitted, although the address given on the petition differs from the address of record. If appropriate, a request to change the address of record should be filed. A courtesy copy of this decision is being mailed to the address given on the petition; however, the Office will mail all future correspondence solely to the address of record.

The differing addresses raise the issue of whether the date of receipt of January 15, 2002, is the date the examiner's action was received at the correspondence address of record or is the date the action was received at the address on the petition. The Office need not address this issue at the time since the petition is being dismissed for other reasons.

Petitioner delayed filing the instant petition from April 26, 2002, until January 31, 2003. The Office need not address whether the entire delay was reasonable and prudent since the petition is being dismissed for other reasons.

As there is no requirement for the timely submission of a Reply Brief, to avoid the abandonment of an application, the failure to timely submit a Reply Brief has not resulted in the abandonment

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[6] See Harris v. Hutchinson, 209 F.3d 325, 330-331 (4th Cir. 2000) (Plaintiff argues that he relied on "negligent and erroneous advice" of his attorney. Attorney agrees his advice was erroneous. The court holds, "[A] mistake by a party's counsel in interpreting a statute of limitations does not present the extraordinary circumstance beyond the party's control where equity should step in to give the party the benefit of his erroneous understanding.") (citing Taliani v. Chrans, 189 F.3d 597, 598 (7th Cir. 1999) as "holding that a lawyer's miscalculation of a limitations period is not a valid basis for equitable tolling."; citing Sandvik v. United States, 177 F.3d 1269, 1272 (11th Cir. 1999) (per curiam) as "refusing to toll the limitations period where the prisoner's delay was assertedly the result of a lawyer's decision to mail the petition by ordinary mail rather than to use some form of expedited delivery."; citing Gilbert v. Secretary of Health and Human Services, 51 F.3d 254, 257 (Fed. Cir. 1995) as "holding that a lawyer's mistake is not a valid basis for equitable tolling."; other citations omitted.)

[7] See Honigsbaum v. Lehman, 903 F. Supp. 8, 37 USPQ2d 1799 (D.D.C. 1995) (Commissioner did not abuse his discretion in refusing to waive requirements of 37 CFR 1.10(c) in order to grant filing date to patent application, where applicant failed to produce Express Mail customer receipt or any other evidence that application was actually deposited with USPS as Express Mail), aff'd without opinion, 95 F.3d 1166 (Fed. Cir.1996); Nitto Chemical Industry. Co., Ltd. v. Comer, 39 USPQ2d 1778, 1782 (D.D.C. 1994) (Commissioner's refusal to waive requirements of 37 CFR 1.10 in order to grant priority filing date to patent application not arbitrary and capricious, because failure to comply with the requirements of 37 CFR 1.10 is an "avoidable" oversight that could have been prevented by the exercise of ordinary care or diligence, and thus not an extraordinary situation under 37 CFR 1.183); Vincent v. Mossinghoff, 230 USPQ 621 (D.D.C. 1985) (Misunderstanding of 37 CFR 1.8 not unavoidable delay in responding to Office Action); Gustafson v. Strange, 227 USPQ 174 (Comm'r Pats. 1985) (Counsel's unawareness of 37 CFR 1.8 not extraordinary situation warranting waiver of a rule); In re Chicago Historical Antique Automobile Museum, Inc., 197 USPQ 289 (Comm'r Pats. 1978) (Since certificate of mailing procedure under 37 CFR 1.8 was available to petitioner, lateness due to mail delay not deemed to be extraordinary situation).

of this application. Accordingly, this application is not abandoned, and the provisions of 37 CFR 1.137 do not apply in this instance. Nonetheless, it is appropriate to apply the principles thereof to the situation at issue. Since 37 CFR 1.183 is based on equity, the Office may determine various requirements for relief and forms of relief. The Office offers the following remedy to petitioner.

Petitioner may wish to consider filing a petition to the Commissioner requesting acceptance of the delayed reply brief as if timely filed on the grounds that the delay was unintentional.

A petition requesting acceptance of a delayed Reply Brief on the grounds of unintentional delay must be filed promptly and such petition must be accompanied by:
(1) the reply brief (which has already been filed), and
(2) the petition fee set forth in 37 CFR 1.17(m), and
(3) a statement that the "delay was unintentional."

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petition
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

By facsimile: (703) 308-6916
Attn: Office of Petitions

By hand: Office of Petitions
2201 South Clark Place
Crystal Plaza 4, Suite 3C23
Arlington, VA 22202

Telephone inquiries should be directed to Petitions Attorney Steven Brantley at (703) 306-5683.

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